

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEXTER COLE,

Defendant and Appellant.

B212583

(Los Angeles County
Super. Ct. No. BA255319)

APPEAL from a judgment of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Julie A. Harris, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Dexter Cole appeals from the judgment entered after he pleaded guilty to two counts of second degree robbery, two counts of assault with a firearm, possession of a firearm by a felon, and conspiracy to commit robbery. Cole was sentenced to a prison term of 28 years, 8 months. He appeals his sentence, contending punishment on the felon in possession of a firearm count should have been stayed pursuant to Penal Code section 654.¹ We disagree, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*²

Miroslaw and Irene Kohut owned Little Switzerland, a jewelry store, located in the City of Glendale.³ On April 2, 2005, Irene received telephone calls from two different men asking what time the store closed. She told the callers that the store closed between 5:30 and 6:00 p.m. At approximately 4:40 p.m., Billy Joe Spencer arrived at the shop and rang the bell. Miroslaw was reluctant to let him enter because it was near closing, but Spencer insisted that he was a former customer and knew Irene. Miroslaw let him in and left the door unlocked. Irene unlocked the jewelry case and showed Spencer their selection of earrings. Spencer appeared unable to find an item he wanted to purchase, however, and Miroslaw had a feeling something was “not right.” Accordingly, he locked the safe and hid the key.

While Spencer was looking at the jewelry, Cole entered the shop and asked if Miroslaw repaired watches. Miroslaw stated he did not, and walked back to his repair room. Cole asked Irene why she had stated on the telephone that the shop closed at 6:00 p.m., when in fact they were closing at 5:30 p.m. Irene replied that they closed at 5:30 p.m. if there were no customers in the shop.

¹ All further undesignated statutory references are to the Penal Code.

² Because Cole pleaded guilty, we glean the facts from the transcript of the grand jury proceedings.

³ For ease of reference, we hereinafter refer to the Kohuts by their first names.

Cole then handed a gun to Spencer. Spencer followed Miroslaw to the back room and hit him over the head with the gun, causing Miroslaw to bleed profusely. Spencer pinned Miroslaw to the floor and hit and kicked him. Cole threw Irene to the floor behind the showcase and began beating her. He then dragged her down the back corridor to the safe, while she begged him to stop. Spencer handed the gun back to Cole, and Cole hit Irene in the head with it several times. Cole gave the gun back to Spencer and continued hitting and kicking Irene, causing her to lose consciousness. When she came to, Cole demanded that she open the safe. When she was unable to, he threw her to the ground again, taped her legs, eyes, and mouth, and handcuffed her.

Meanwhile, Spencer choked Miroslaw and told him to get the key to the safe. Miroslaw said he could not recall where it was, because he had been hit too many times. Spencer threatened that Miroslaw should give him the key, “or else.” While in the front portion of the store looking for the key, Miroslaw managed to trigger the silent alarm by leaning against the alarm button. Spencer handcuffed and taped Miroslaw, and placed jewelry from the display case in a bag.

Spencer received two telephone calls on his cellular telephone. After the second call, he told Cole, “It’s over[.] [L]et’s go.” The men fled through the back door, leaving the bag of jewelry behind. They were apprehended by police after a brief foot pursuit. A Glock handgun, which had been reported stolen prior to the robbery, was recovered near the robbery scene.

2. Procedure.

Cole pleaded guilty to the second degree robberies of Irene and Miroslaw (§ 211, counts 1 & 2); two counts of assault with a firearm (§ 245, subd. (a)(2), counts 3 & 4); possession of a firearm by a felon (§ 12021, subd. (a)(1), count 5); and conspiracy to commit robbery (§ 182, subd. (a)(1), count 10). Cole admitted personally inflicting great bodily injury on Irene (§ 12022.7, subd. (a)), victimizing persons 65 years of age or older (§ 667.9), personally using a firearm (§ 12022.53, subd. (b)), and suffering a prior conviction for robbery, a serious or violent felony (§§ 667, subds. (a)(1), (b)-(i) & 1170.12, subds. (a)-(d)). The trial court sentenced Cole to a prison term of 28 years, 8

months. It imposed a restitution fine, a suspended parole restitution fine, and a court security fee. Cole obtained a certificate of probable cause on the question of whether sentence on count 5 should have been stayed pursuant to section 654. He appeals on that issue.

DISCUSSION

Section 654 did not preclude the imposition of punishment on the possession of a firearm by a felon conviction.

The trial court imposed a sentence of 22 years on count 1, the robbery of Irene; a consecutive sentence of 5 years, 4 months on count 2, the robbery of Miroslaw; and a consecutive sentence of 1 year, 4 months on count 5, felon in possession of a firearm.⁴ Sentence on counts 3 and 4 (assault with a firearm) and count 10 (conspiracy) was stayed pursuant to section 654. Cole contends that pursuant to section 654, sentence on count 5, felon in possession of a firearm, should also have been stayed. We disagree.

Section 654, subdivision (a), provides that an “act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” Section 654 precludes multiple punishment for a single act or a course of conduct comprising indivisible acts. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1142-1143; *People v. Conners* (2008) 168 Cal.App.4th 443, 458; *People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603.)

“ ‘Whether a course of criminal conduct is divisible . . . depends on the intent and

⁴ Sentence was calculated as follows. On count 1, the base count, the court imposed the low term of two years, doubled pursuant to the Three Strikes law, plus 3 years for the section 12022.7, subdivision (a) great bodily injury enhancement, 5 years for the section 667, subdivision (a)(1) serious felony enhancement, and 10 years for the section 12022.53, subdivision (b) firearm enhancement. On count 2, the court imposed one-third of the midterm, i.e., one year, doubled pursuant to the Three Strikes law, plus 3 years, 4 months for the section 12022.53, subdivision (b) firearm enhancement. On count 5, the court imposed one-third of the midterm, i.e., 8 months, doubled pursuant to the Three Strikes law.

objective of the actor.’ [Citations.] ‘[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent’ ” and therefore may be punished only once. (*People v. Jones, supra*, at p. 1143; *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If the defendant harbored multiple or simultaneous objectives, he or she may be punished for each violation committed in pursuit of each objective, even though the violations share common acts or were part of an otherwise indivisible course of conduct. (*People v. Jones, supra*, at p. 1143; *People v. Conners, supra*, at p. 458.)

Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Jones, supra*, 103 Cal.App.4th at p. 1143; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564.) The trial court’s findings will not be reversed on appeal if there is substantial evidence to support them. (*People v. Jones, supra*, at p. 1143; *People v. Perry* (2007) 154 Cal.App.4th 1521, 1525; *People v. Moseley, supra*, 164 Cal.App.4th at p. 1603.) “We review the trial court’s determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.” (*People v. Jones, supra*, at p. 1143.)

Whether a violation of section 12021, forbidding ex-felons from possessing firearms, constitutes a divisible transaction from the offense in which the felon employs the firearm depends on the facts and evidence in each individual case. (*People v. Jones, supra*, 103 Cal.App.4th at p. 1143.) Where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm is improper. (*Ibid.*) Thus, multiple punishment is improper where the evidence demonstrates, at most, that “ ‘fortuitous circumstances put the firearm in the defendant’s hand[s] only at the instant of committing another offense’ [Citation.]” (*Id.* at p. 1144; *People v. Garcia, supra*, 167 Cal.App.4th at p. 1565; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412; *People v. Bradford* (1976) 17 Cal.3d 8, 22; *People v. Venegas* (1970) 10 Cal.App.3d 814, 821.)

On the other hand, “where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved.” (*People v. Jones, supra*, 103 Cal.App.4th at p. 1143.) Thus, in *Jones*, we concluded that “when an ex-felon commits a crime using a firearm, and arrives at the crime scene already in possession of the firearm, it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime. . . . [S]ection 654 will not bar punishment for both firearm possession by a felon (§ 12021, subd. (a)(1)) and for the primary crime of which the defendant is convicted.” (*People v. Jones, supra*, at p. 1141.)

In *Jones*, defendant Jones and another man drove to the home of Jones’s ex-girlfriend, Kyshanna Walter. The driver rang the girlfriend’s doorbell and asked to speak to her. Upon being informed she was not available, he and Jones drove off. Fifteen minutes later, the men returned and slowly drove past the girlfriend’s home. Jones fired several shots at the house. (*People v. Jones, supra*, 103 Cal.App.4th at pp. 1141-1142.) Jones was convicted of shooting at an inhabited dwelling and being a felon in possession of a firearm. The trial court imposed sentence on both counts.

On appeal, Jones argued that, because his possession of the gun was incidental to and simultaneous with the primary offense of shooting at an inhabited dwelling, section 654 precluded the imposition of sentence on both offenses. (*People v. Jones, supra*, 103 Cal.App.4th at p. 1142.) We rejected this contention. We explained, “section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm.” (*Id.* at p. 1145.) It was a reasonable inference that Jones’s possession of the firearm was antecedent to and separate from the primary offense of shooting at an inhabited dwelling. (*Id.* at p. 1147.) “It strains reason to assume that Jones did not have possession for some period of time before firing shots at the Walter home. Any other interpretation would be patently absurd. Jones committed two separate acts: arming himself with a firearm, and shooting at an inhabited dwelling. Jones necessarily had the firearm in his possession *before* he shot at Kyshanna’s house It was therefore a reasonable inference that Jones’s possession of the firearm

was antecedent to the primary crime. [Citation.] Section 12021 is violated whenever a felon intentionally has the weapon in constructive or actual possession. [Citation.] Jones necessarily must have had either actual or constructive possession of the gun while riding in the car, as evidenced by his control over and use of the gun during the shooting. Jones's violation of section 12021 was complete the instant Jones had the firearm within his control prior to the shooting. [Citation.]" (*Ibid.*) Further, the evidence "supported an inference that Jones harbored separate intents in the two crimes. Jones necessarily intended to possess the firearm when he first obtained it, which . . . necessarily occurred antecedent to the shooting. That he used the gun to shoot at Kyshanna's house required a second intent *in addition* to his original goal of possessing the weapon. Jones's use of the weapon after completion of his first crime of possession of the firearm thus comprised a 'separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon.' [Citation.]" (*Id.* at p. 1147.)

As is readily apparent, *Jones* is indistinguishable from the case at bar. Cole came to Little Switzerland armed with a gun. Cole must have had possession for some period of time *before* he entered the jewelry store. Cole committed two separate acts: arming himself with the gun, and using the gun in the robbery. It was therefore a reasonable inference that his possession of the gun was antecedent to the primary crime. (See *People v. Jones, supra*, 103 Cal.App.4th at p. 1147; *People v. Ratcliff, supra*, 223 Cal.App.3d at p. 1413.) The evidence also suggested Cole had separate intents, i.e., the intent to possess the firearm when he first obtained it antecedent to the robbery, and a second, additional intent to use it to commit the robbery. (*People v. Jones, supra*, at pp. 1147-1148.)

Cole's contrary argument is based on a misreading of the record. Cole argues that *after* he entered the store, "co-defendant Spencer pulled out a gun" and later handed the gun to Cole. He points out that only one gun was recovered. Therefore, he suggests, this case is analogous to those in which the defendants did not come to the scene of the primary crime armed, but instead obtained the weapon during the course of the primary

offense. (See *People v. Bradford*, *supra*, 17 Cal.3d at pp. 13, 22 [when stopped for speeding, the defendant wrested away an officer's revolver and shot at him with it; section 654 precluded punishment for both assault with a deadly weapon and possession of a firearm by a felon]; *People v. Venegas*, *supra*, 10 Cal.App.3d at pp. 819, 821 [where evidence suggested felon obtained gun during bar brawl, rather than beforehand, he could not be punished for both violation of section 12021 and assault with a deadly weapon].)

Contrary to Cole's argument, the evidence showed that Cole had the gun when he entered the store. Irene testified that Cole entered the store and asked about closing time. Cole then "g[a]ve the gun to the first guy," i.e., Spencer. Spencer jumped at Miroslaw and Cole threw Irene to the floor behind the display case. Subsequently, after Cole dragged Irene down the corridor, Spencer returned the gun to Cole, who used it to hit Irene in the head. Thus, while the evidence showed the men transferred the gun back and forth during the robbery, there was substantial evidence that Cole entered the store already armed with the gun.

Finally, we observe that the purpose of section 654 is to ensure that punishment is commensurate with a defendant's culpability. (*People v. Jones*, *supra*, 103 Cal.App.4th at p. 1148.) "This concept 'works both ways. It is just as undesirable to apply the statute to lighten a just punishment as it is to ignore the statute and impose an oppressive sentence.' [Citation.] Section 12021 uniquely targets the threat posed by felons who possess firearms. [Citation.]" (*Ibid.*) There is no reason why a felon who chooses to arm himself in violation of section 12021 should escape punishment for that offense because he then uses the firearm to commit a second offense. (*People v. Jones*, *supra*, at p. 1148.) Punishment for both the possession of a firearm by a felon and the robberies is commensurate with Cole's culpability and furthers the legislative goal of discouraging firearm possession by felons. (See *ibid.*)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.